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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

THOMAS E. WOLF, Petitioner,

V.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS-PRESENTED

1) Whether, in a criminal prosecution, it is permissible for the government to charge in the indictment and contend at trial that the defendant violated or conspired to violate civil banking laws, when violation of those laws does not carry a criminal penalty?

2) Whether certiorari should be granted to resolve the conflict between the decision below and the opinion of the Fifth Circuit in United States v. Christo, 614 F.2d.486 (5th.Cir. 1980)?

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

THOMAS E. WOLF, Petitioner,

V.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner, Thomas E. Wolf, prays that a writ of certiorari issue to review the portion of the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on July 6, 1987, which affirmed the order of the United States District Court for the District of Oregon.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is officially reported at 820

F.2d 1499. A copy is attached hereto as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. Petitioner's appeal was decided by the Ninth Circuit Court of Appeals on July 6, 1987. A timely petition for rehearing was denied on October 27, 1987. Appendix B.

STATUTORY AND REGULATORY PROVISIONS

Oregon revised Statute (ORS 708.305)

Regulation O, 12 C.F.R. §215

18 U.S.C. §371

18 U.S.C. §1005

The text of the above provisions are set forth in Appendix C, infra.

STATEMENT OF THE CASE

Petitioner Wolf was convicted on various counts of misapplying bank funds, 18 U.S.C. §656; making false entries in

bank records, 18 U.S.C. §1005; and one count each of issuing an obligation of the bank without authorization, 18 U.S.C. §1005; and conspiring to defraud the United States, 18 U.S.C. §371.

The pertinent facts are stated in the Court of Appeals opinion: 1 /

> * * * Thomas Wolf was a founder and director of Columbia Pacific Bank (Columbia Pacific) and served as its chief legal counsel. He was also a founder and shareholder of First Northwest Mortgage Company (First Northwest), which made loans to real estate developers. Columbia Pacific was First Northwest's main source of capital. When First Northwest reached its borrower's limit under Oregon law but needed more capital, Wolf arranged for his fellow shareholders in First

1 / A portion of the facts are taken directly from the "Summary" provided by the Court below. This summary is not officially reported but is included as part of the "unofficial" report required by Rule 21.

Northwest to obtain personal loans from Columbia Pacific and immediately turn over the loan proceeds to First Northwest. The loan documents listed the individuals as the borrowers and did not indicate that the beneficial user would be First Northwest.

When First Northwest was unable to repay Columbia Pacific because of its failed attempt to rescue one of its struggling customers, a development company, Wolf instigated the reorganization of the development company into a joint venture that eventually became the Central Point Development Company (Central Point). Because Central Point would need far more money than Columbia Pacific could legally lend to any one customer, Wolf caused Central Point to spin off two new companies [Rogue Valley and Kingsland Manor] that along with Central Point each borrowed hundreds of thousands of dollars from Columbia Pacific without revealing Wolf's relationship to these entities. Columbia Pacific subsequently failed, and a grand jury returned a 41-count indictment against Wolf for misapplying bank funds, making false entries in bank records, issuing an obligation of the bank without authorization, and conspiring to defraud the United States. * * *

Before Wolf's trial, defense counsel moved to strike from the indictment all reference to civil banking statutes. The court denied the motion.

> At trial, Richard Warriner, a bank examiner for the Federal Deposit Insurance Corporation, testified over Wolf's objection regarding Wolf's alleged violations of Federal Reserve Board Regulation O (12 C.F.R.§215), and Oregon Revised Statute §708.305, pertaining to bank lending limits. * * * The jury convicted Wolf on all counts.

(App.A, pp.2-4)

On appeal, Wolf argued inter alia that references to violations of a state civil banking statute and a federal bank regulation (Regulation O) unfairly prejudiced him. The court below reversed and remanded for retrial Wolf's conviction on Counts 2-29 and Counts 31-35. The court affirmed the conviction on Count 1, Count 30, and Counts 37-41. In reversing the conviction on the misapplication and false entry counts (Counts 2-29) (Counts 31-35), the court noted that references to alleged violations of Regulation O (the "insider regulation") were a "key part of the government's case" (App.A, p.29).

Regulation O requires approval of a majority of the board of directors to approve loans made to bank officers or executives or to businesses that they control. The court held that the government's evidence and argument improperly suggested "that it was criminal to submit loan applications that did not satisfy Regulation O's disclosure requirement." (App.A, p.31,n.1) The court went on to hold, however, that:

> "The taint from the improper use of Regulation O does not extend to the conspiracy count [Count 1] or the counts concerning the director's audits [Counts 37-41]. . . Regulation O had nothing to do with the audits * * *, there is no reason to believe the jury considered it in deliberating these counts."

(App.A p.32)

With regard to the evidence of bank lending limits, the court held that:

> "* * * violation of lending limits was not directly or indirectly an element of any of the charges. Lending limits provided background information bearing on motive and intent. The court properly made this clear in its jury instructions by describing the civil violations as background only."

(App.A pp.28-29)

REASONS FOR GRANTING THE WRIT

(1) Certiorari should be granted to resolve the question of whether, in a criminal prosecution, it is permissible for the government to charge in the indictment and contend at trial that the defendant violated or conspired to violate civil banking laws, when such violation does not carry a criminal penalty.

Each of the seven counts (Counts 1, 30, 37-41) on which Wolf was convicted has as its main premise an alleged violation of the Oregon lending limit statute (ORS 708.305.) See App. C, infra. Under this statute, Columbia Pacific, a state chartered bank, was subject to banking regulations which limited the amount it could lend on unsecured loans to a single

borrower to $421,825.00. At the time of the loans specified in the indictment, First Northwest and Central Point, the companies allegedly controlled by Wolf, had already borrowed their limits from Columbia Pacific. The government therefore argued that the loans to the First Northwest shareholders (Hardy, Brookens and Griffith) were in reality loans to First Northwest which violated the lending limit statute. The government similarly argued that loans to Rogue Valley and Kingsland Manor were in fact loans to Central Point also in violation of the lending limit statute. The government's theory of the case, expressed in the conspiracy count (Count 1) was that Wolf and Tom Pendergraft (formerly president of Columbia Pacific Bank) conspired to structure these loans to "[c]ircumvent federal and state bank regulations relating to lending limits and insider loans * * *". (ER4-5)

This was the central charge in the indictment - the one upon which all of the government's charges, including the remaining six counts upon which Mr. Wolf was convicted, were based. 2/ So structured, the government's case presented three serious problems:

First, the government's theory built a federal felony case upon alleged violations of a state civil statute, a statute which, even if violated, would not have subjected defendant to any criminal penalty, let alone three years' incarceration.

2/ Count 30 alleged that Mr. Wolf, without authority from the the Columbia Pacific Board of Directors, caused Mr. Pendergraft to issue a letter to another bank committing Columbia Pacific to provide permanent financing for First Northwest in an amount (1.2 million dollars) which would exceed Columbia Pacific's lending limit. (ER23-A) The loan in fact was never made by Columbia Pacific and First Northwest ultimately received its permanent financing from another bank. (RT980-982) The government argued, however, that the "intent to injure and defraud" the bank,

Second, the state lending limit statute around which the government wove its case concerns conduct which is wrong only because it is prohibited, not conduct which is malum per se or wrong in itself. As a consequence, intent wrongful or otherwise--is wholly irrelevant under the statute; violation of the statute may be

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2 / (cont'd) alleged in the indictment (ER23-A), was shown by the fact that Wolf and Pendergraft did not disclose the loan commitment to the board because they wanted to hide Columbia Pacific's alleged violation of the lending limit law in making it. (RT123, 209-210, 186-199, 1237, 1377).

Counts 37-41 charged that Mr. Wolf inter alia omitted entries or made false entries in bank records when he signed bank confirmations and questionnaires which did not disclose his alleged "related interest" in First Northwest. (ER20-23) The language on these bank statements and questionnaires were taken directly from Regulation O. The government's "expert" witness, Mr. Warriner, testified that the language on these forms was an excerpt from Regulation O requiring disclosure of insider transactions (ER113). The government argued that Wolf's failure to answer these questionnaires accurately constituted a violation of the bank laws dealing with "insider transactions" (RT1219-1220)

established without proving wrongful intent. 3/ Nonetheless--and despite the government's concession (ER 40-41) that proof of the requisite criminal intent under the federal felony provisions cited in the indictment could not be inferred from violation of the civil statute--that statute remained at the center of the government's case.

Third, because none of the bank loans, as made, violated the lending limit statute--numerous court decisions so hold--the government's circumvention claim was rooted in a controversial legal

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3/ A loan to IBM or General Motors in excess of the applicable lending limit, for example, would constitute a violation, even though the prospect of economic injury to the bank would be de minimus.

interpretation of the civil statute. 4/ Thus, the government set out to prove that petitioner acted with specific criminal intent simply because he acted upon a reasonable legal interpretation of the statute, though it was an interpretation with which the government happened not to agree.

4/ With regard to the lending limits, Wolf testified that he arranged the loans to Griffith, Brookens, Hardy and the development companies only because First Northwest and Central Point could not borrow enough money directly. If Oregon did not have a lending limit statute, all of the loans involved in this case could have been made directly to First Northwest. Because Oregon had such a statute, it was necessary as Wolf testified, not illegal, to make separate loans to others to comply with the statutory command that "the total obligations of [First Northwest to the] bank shall not exceed 15 percent of the aggregate paid up and unimpaired capital and surplus." ORS 708.305(1). The case law holds without exception that a bank can lend money to related corporations or individuals even if the aggregate sum exceeded the maximum the bank could lend to any one borrower. See Hughes v. Reed, 46 F.2d 435, 442 (10th Cir. 1931) (federal lending limit statute "does not prohibit ten percent loans to different persons or

Throughout the indictment, the government also charged that petitioner caused loans to be made in violation of the insider loan provisions of Regulation O. Those charges were based upon the government's controversial legal interpretation of the state lending limit statute from which it argued (i) the loans to the First Northwest shareholders

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4 /(cont'd)different corporations, if they be in fact separate loans, notwithstanding the borrowers may be related or affiliated. It may not be good business, or even a violation of the common law duty, to lend too much money to persons or businesses which are affiliated but separate, but it does not fall within the statutory ban"). See also First National Bank of Lincolnwood v. Keller, 318 F Supp 339 (ND Ill 1970); McRoberts v. Spaulding, 32 F.2d 315 (D Iowa 1929); Seiffert v. State, 501 SW2d 124, 127-128 (Texas 1973) (court reversed a conviction under Texas lending limit statute on the ground that separate loans to a corporation president and his son must be considered separate obligations of those individuals even though there was "no question [that the corporation] eventually received the proceeds of the three notes and used such proceeds for its own corporate purposes." Since the individuals "were liable to the bank on their

should be ignored and treated as loans to First Northwest, (ii) the loans to Rogue Valley and Kingsland Manor should be ignored and treated as loans to Central Point. Thus, the indictment not only charged that violation of a state civil statute constituted a federal felony, or evidence of specific criminal intent, but also that the alleged violations of the state statute were violations of a federal civil banking regulation, the secondary effects of which constituted a crime.

4/ (cont'd) respective notes * * *, it is immaterial what disposition was made of the proceeds thereof. Having made the loans to the individuals, bank could not hold [the corporation] liable upon such obligation which it did not execute, assume or agree to pay").

Throughout the trial the evidence contained repeated references to the insider regulation and the lending limit statute. 5/ In their arguments to the jury, the government prosecutors hammered home their theory that the defendant had committed federal crimes by violating, or attempting to violate, the Oregon lending limit statute and Regulation O. (RT 82, 86, 1220, 1221-1222, 1230).

This court should examine the question of under what circumstances, if any, violations of a civil statute or regulation can be used as evidence to prove a crime. A well established line of cases holds that maladministration, neglect of duty, breach of trust or violations of civil regulations can not constitute criminal conduct. See

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5 / RT. 155-158, 161-163, 166, 175, 177, 179, 203-204, 206, 210, 277, 292-293, 417, 576, 579-582, 627-628, 647, 722, 742, 773-778, 853, 857-858, 972, 974, 979, 997, 1009, 1012-1013, 1015-1020, 1151-1152.

United States v. Britton, 108 U.S. 193, 199 (1883); United States v. Steinman, 172 F. 913, 916 (3rd Cir. 1909) (bank overdrafts in excess of civil lending limitations not evidence of intent to defraud under misapplication statute); United States v. Harper, 33 F. 471, 478 (W.D. Ohio 1887); United States v. Mulloney, 8 F.Supp. 674, 677 (D. Mass. 1934), aff'd 79 F.2d 566 (1st Cir. 1935) (violation of bank regulations prohibiting self-dealing not sufficient to establish criminal misapplication of bank funds); United States v. Rogriguez, 654 F.2d 315, 318 (5th Cir. 1981) (failure to comply with postal regulations cannot constitute a criminal offense).

Petitioner's fundamental argument is that, even if we were to assume violations of both the lending limit statute and Regulation O, there can be no crime. Proof of violation of a civil statute or regulation does not equate with a felony

conviction requiring a specific criminal intent-a necessary element of each of the seven counts for which petitioner was convicted.

(2) Certiorari should be granted to resolve the conflict between the decision below and the decision of the Fifth Circuit Court of Appeals in United States v. Christo, 614 F.2d 486 (1980).

As previously related, the government built its case almost entirely upon its dubious legal theory that the loans were made to circumvent the Oregon lending limit statute. Thus, if the separate loans were properly structured to comply with the statute, as petitioner claimed, (RT.948-950, 973-974, 981-982), the government had no case. 6/

6/ If the loans were in fact separate loans to the First Northwest shareholders, or thought to be such by Wolf as he testified (RT 948-950) the jury could have concluded that Wolf did not provide false answers, or intend to deceive bank examiners, when he submitted the bank

The case against petitioner depended upon the jury's acceptance of the government's controversial legal theory alleging a violation of the lending limitation statute and not upon any facts which it had set out to prove. That is impermissible under the Fifth Circuit's decision in United States v. Christo, 614 F.2d 486 (1980), which held that evidence of lending limit violations can not be used to prove a criminal act. The facts and holding in Christo were summarized by the court below:

> "The defendant in Christo was both Chairman of the Board and a majority stockholder of a Florida bank. He was indicted for misapplication and false entry based on alleged overdrafting of his checking account in violation of 12 U.S.C. §375, which prohibits banks from extending credit for more than $5,000.00 to its own executive officers. At the trial, the

6/ (cont'd) questionnaires which formed the basis of counts 37-41. This is so since the loans, under that assumption, were not to a "related interest" or to a company controlled by Wolf but rather were separate loans to shareholders not in violation of the lending limit statute.

> government had repeatedly referred to Christo's violations of the civil statutes and the Court instructed the jury it could find that the §375 violations constituted a criminal misapplication of bank funds. Christo was convicted, but the Fifth Circuit held that the government's references to violations of §375 'impermissibly infected the very purpose for which the trial was being conducted--to determine whether Christo willfully misapplied bank funds with an intent to injure and defraud the bank." 614 F.2d at 492.

(App.A, pp.25-26)

Christo recognizes that "Crimes are not to be created by inference," United States v. Laub, 385 U.S. 475, 487 (1967), "from the combination of civil statutes and government disapproval." United States v. Frade, 709 F.2d, 1387, 1392 (11 Cir. 1983).

As the Court concluded in Christo:

> "A conviction, resulting from the Government's attempt to bootstrap a series of checking account overdrafts, a civil regulatory violation, into an equal amount of misapplication felonies, cannot be allowed to stand."

(614 F.2d at 492)

In rejecting our argument that the rationale of Christo applied with equal force here, the court below noted as follows:

> "The focus was on whether certain loans were made under a false record. * * * As in Stefan [United States v. Stefan, 784 F.2d 1093 (11 Cir. 1986)] violation of lending limits was not directly or indirectly an element of any of the charges. Lending limits provided background information bearing on motive and intent."

(App.A, p.28)

Contrary to the holding of the court below, the alleged lending limit violations by Mr. Wolf were central to the Government's case. 7/ In United States v. Stefan, 784 F.2d 1093, (11th Cir. 1986), cited by the court below, the court held that references to a federal lending limit statute (12 U.S.C.§84) did not constitute reversible error in a misapplication case because, unlike here, "the government did

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7 / See pp.8-9 supra, and n.2, pp.9-11.

not base its prosecution for misapplication of bank funds on * * * alleged violations of * * * 12 U.S.C.§84." 784 F.2d at 1098. In Stefan, violation of the federal lending limit statute was not contested, as it is in this case. There was no dispute that Stefan, the president of Miami National Bank, had arranged 4.5 million dollars in loans for one project through a series of loans to related companies. It was also undisputed that 12 U.S.C.§84 prohibited loans by national banks to related borrowers which aggregated more than the national bank's lending limit. Stefan, supra, 784 F.2d at 1096. The bank involved here is not a national bank; the limitations of 12 U.S.C.§84 did not apply to Columbia Pacific. The applicable Oregon Lending Limit Statute (ORS 708.305) quite simply did not prohibit loans to related borrowers which aggregate in excess of a

single loan lending limit. See pp.12-14, supra, n.4.

The fundamental error in this case is that the indictment charged, and the prosecutors were permitted to argue repeatedly, at length, and to introduce expert testimony that there were Oregon lending limit violations. As it was left, the jury was instructed that the lending limit law was irrelevant to the case except to their "understanding of the reasons and motives for the various loan transactions" (RT 1405). The crucial issue was precisely Mr. Wolf's motive and intent for his disclosure or non-disclosure of the First Northwest and Central Point relationships. The jury was permitted to presume state law violations and to infer a motive to conceal such violations. The court below made precisely the same wrongful presumption when it stated that the trial court

instructions on lending limits properly "describ[ed] the civil violations as background only." (Emphasis supplied) (App.A, p.29)

There was no question in Christo that the loan to the executive officer violated the federal civil statute. Here, however, the defendant and the government were in sharp disagreement about whether the separate loans complied with the Oregon civil statute. That dispute made the outcome of a federal criminal case depend upon the outcome of the dispute over the meaning of the state civil statute. The jury of course could not properly have resolved that legal dispute in any case. Since the government's "insider loan" charges depended upon proof of civil violations under its "lending limit" theory, it managed to double the wrong and resultant prejudice to Mr. Wolf.

The government did not challenge Christo but argued instead that the alleged civil violations were relevant to prove petitioner's "intent" and "motive". (ER 41-43). That argument simply does not wash, for at least four reasons. First, as in Christo, the indictment and evidence here contained precise allegations of civil violations. See pp.8-9, 15, n.2,5, supra. Under the seven counts for which Mr. Wolf stands convicted, those civil violations constitute evidence of crimes, not just evidence of intent or motive. Second, it was impossible to infer intent or motive without first resolving the non-jury question whether the government's legal interpretation of the lending limit statute was or was not correct. United States v. Varbel, 780 F.2d 758,760-762, (9th Cir. 1986), Third, because there was an honest debate about the proper interpretation and application of the Oregon statute, the jury

could not infer that Wolf acted with wrongful motive or intent -- i.e., with the requisite specific criminal intent -- merely because he accepted and acted upon a legal interpretation which the government thinks is wrong. See, United States v. Dahlstrom, 713 F.2d 1423, 1428-29 (9th Cir. 1983). "It is settled that when the law is vague or highly debatable, a defendant - actually or imputedly - lacks the requisite intent to violate it." United States v. Critzer, 498 F.2d 1160,1162 (4th Cir. 1974). Last, regardless of the outcome of the legal dispute, a wrongful intent or motive may not be inferred from proof of actual or attempted violation of a civil statute under which intent or motive are irrelevant.

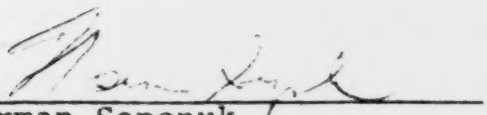
The lending limit statute and Regulation O are merely civil banking laws which carry civil, not criminal, sanctions. It was improper for the government to test

the validity of its construction of those laws in this criminal case, and defendant should never have been prosecuted under this theory of the indictment in the first place. To what extent, if any, does the decision in Christo, and of the the court below sanction the use of alleged civil violations in a criminal case? Petitioner asks the Court to resolve this important question in the administration of criminal justice.

CONCLUSION

For the reasons stated, the writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit reversed.

Respectfully submitted,



Norman Sepenuk
Attorney for Petitioner

APPENDIX A
A-1
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America,	)	
	)	
Plaintiff-Appellee,	)	No. 86-3041
	)	D.C.No.
vs.	)	CR 85-115-FR
	)	OPINION
Thomas E. Wolf,	)	
	)	
Defendant-Appellant.	)	

Argued and Submitted
January 5, 1987-Portland, Oregon

Filed July 6, 1987

Before: M. Oliver Koelsch, Alfred T. Goodwin and David R. Thompson, Circuit Judges.

Opinion by Judge Goodwin

Appeal from the United States District Court For the District of Oregon
Helen J. Frye, District Judge, Presiding

SUMMARY

Criminal Law

Appeal from a conviction for misapplying bank funds, making false entries in bank records, issuing an obligation of a bank without authorization,

and conspiring to defraud the United States. Affirmed in part, and reversed in part and remanded.

Appellant Thomas Wolf was a founder and director of Columbia Pacific Bank (Columbia Pacific) and served as its chief legal counsel. He was also a founder and shareholder of First Northwest Mortgage Company (First Northwest), which made loans to real estate developers. Columbia Pacific was First Northwest's main source of capital. When First Northwest reached its borrower's limit under Oregon law but needed more capital, Wolf arranged for his fellow shareholders in First Northwest to obtain personal loans from Columbia Pacific and immediately turn over the loan proceeds to First Northwest. The loan documents listed the individuals as the borrowers and did not indicate that the beneficial user would be First Northwest.

When First Northwest was unable to repay Columbia Pacific because of its failed attempt to rescue one of its struggling customers, a development company, Wolf instigated the reorganization of the development company into a joint venture that eventually became the Central Point Development Company (Central Point). Because Central Point would need far more money than Columbia Pacific could legally lend to any one customer, Wolf caused Central Point to spin off two new companies that along with Central Point each borrowed hundreds of thousands of dollars from Columbia Pacific without revealing Wolf's relationship to these entities. Columbia Pacific subsequently failed, and a grand jury returned a 41-count indictment against Wolf for misapplying bank funds, making false entries in bank records, issuing an obligation of the bank without

authorization, and conspiring to defraud the United States. At trial, a bank examiner testified over Wolf's objection regarding Federal Reserve Board Regulation O, which pertains to bank lending limits. The jury convicted Wolf on all counts.

[1] The elements of the crime of misapplication of bank funds are: (1) defendant is an executive officer of a bank; (2) the bank is connected with the Federal Reserve; (3) defendant willfully misapplied the bank's funds; and (4) defendant acted with intent to injure and defraud the bank. Wolf concedes the first two elements, but [2] asserts that the transactions here do not constitute misapplication because the "nominal" borrowers were willing and able to repay the loans. However, ability to repay is not a defense. Misapplication occurs whenever bank funds are lent under a record

that misrepresents a material fact, such as the name of the true borrower or the purpose of the loan. [3] Here, the borrowers each failed to disclose their intention to hand the loan proceeds over to another entity. Wolf arranged and supervised the loans, and his actions amounted to misapplication. [4] The intent element is satisfied if the accused intends to deceive bank officials, bank examiners or the Federal Deposit Insurance Corporation. Here, the evidence shows that the entire transaction was a smokescreen designed to hide Wolf's continuing interest in loans made to First Northwest.

[5] The elements of false entry are: (1) defendant made a false entry in bank records, caused it to be made, or aided and abetted its entry; (2) defendant knew the entry was false when it was made; and (3) defendant intended that the entry injure or

deceive a bank official. [6] Here, the record abounds with evidence that the loans entered on the books as going to the stated borrowers were actually destined for First Northwest and Central Point. [7] Furthermore, the record supports the finding that Wolf knew the entries were false, caused them to be made, and intended to deceive bank officials. [8] Because the evidence on the misapplication of bank funds and false entry charges was sufficient to support the verdict, Wolf's argument that the conspiracy count must fail is without merit. [9] However, the evidence and arguments concerning his possible violations of civil banking regulations impermissibly tainted the trial on the counts relating to the nominee loans. [10] The references to violations of Regulation O were a key part of the government's case on the misapplication and

false entry counts. With regard to each of the counts, the indictment charged that Wolf committed a criminal act in part because the loan applications failed to disclose Wolf's connection with First Northwest, the ultimate beneficiary of the loans. However, the criminal statutes do not require a loan applicant to reveal any particular information, and the loan applications themselves did not ask for such information. To supply the missing element of the false entry and misapplication charges, the government turned to Regulation O, which imposed a duty on Wolf to inform the bank's directors that he had an interest in the loan for which the borrowers were applying. This created an impermissible risk that the jury would find Wolf guilty of criminal misapplication and false entry because he failed to comply with Regulation O, and requires reversal on those counts.

COUNSEL

Lance A. Caldwell, Portland, Oregon, for the plaintiff-appellee.

Norman Stepenuk(sic), Portland, Oregon for the defendant-appellant.

OPINION

GOODWIN, Circuit Judge:

Thomas Wolf appeals his conviction on numerous counts of misapplying bank funds, 18 U.S.C. §656; making false entries in bank records, 18 U.S.C. §1005; and one count each of issuing an obligation of the bank without authorization, 18 U.S.C. §1005, and conspiring to defraud the United States, 18 U.S.C. §371. Wolf argues that the evidence did not sustain the verdict and that references to violations of civil bank regulations unfairly

prejudiced him. We hold that sufficient evidence supported the verdict, but that the testimony and arguments regarding civil bank regulations tainted the trial on most of the misapplication and false entry counts. We affirm in part, reverse in part and remand for retrial.

Wolf was a founder and director of Columbia Pacific Bank in Portland, Oregon. From the bank's inception in 1976 to its ruin in 1983, Wolf served as its chief legal counsel and sat on its board of directors. At the same time, he was trustee for his law firm's retirement trust account, which invested several hundred thousand dollars in the bank. From about 1978 on, Wolf was also one of four founders and shareholders of First Northwest Mortgage Company, which made loans to real estate developers. Columbia Pacific Bank was the mortgage company's main source of

capital and Wolf used his connections at the bank to fund loans for the mortgage company.

First Northwest borrowed more than $400,000 from Columbia Pacific, reaching the borrower's legal limit for that type of loan under Oregon law. When the mortgage company needed more capital, Wolf arranged for his fellow shareholders in Northwest Mortgage, Dale Brookens, Les Hardy and Anderson Griffith (who was also Wolf's law partner), to establish individual lines of credit at Columbia Pacific. Wolf prevailed on the bank's president, Thomas Pendergraft, to approve loans of hundreds of thousands of dollars to the shareholders, who immediately turned over the loan proceeds to First Northwest. The loan documents listed Brookens, Hardy and Griffith as the borrowers and did not indicate that the beneficial user would be

First Northwest. When Pendergraft reported the loans to the other directors, as he was required to do, he likewise did not dislose that the loans to the individuals were ultimately used to supply funds to First Northwest.

In two successive annual director's reports, Wolf disclosed to Columbia Pacific his interest in First Northwest. Wolf stopped these disclosures after July 1980 when he transferred title to most of his First Northwest shares to his law partner and fellow shareholder, Griffith. Wolf also did not disclose to the bank that he had signed a guarantee making him jointly liable with fellow First Northwest shareholders for the loans taken from Columbia Pacific for the benefit of First Northwest.

First Northwest initially repaid its various Columbia Pacific loans from its

returns on real estate loans. When Oregon's economy abruptly declined in the early 1980's, however, many of First Northwest's customers fell behind on their mortgage repayments and First Northwest found it increasingly difficult to repay Columbia Pacific. Disaster struck when First Northwest attempted to rescue one of its struggling customers, the CAS Company of Medford, Oregon. At Wolf's instigation, the CAS company reorganized, becoming the Village Joint Venture Partnership, which borrowed approximately one million dollars from First Northwest. When this loan failed to restore the vitality of Village Joint Venture, Wolf next suggested that the company go into partnership with three of First Northwest's partners, Griffith, Brookens and himself. (Hardy, by this time, had dropped out of First Northwest). He proposed that each participant put up a

substantial sum of money, which would enable Village to pay its debts and begin to develop property. The joint venture partners eagerly accepted this proposal. Village Joint Venture became the Central Point Development Company, which inherited the financial debility of Village. Central Point soon found itself urgently in need of money. Wolf suggested that it borrow from Columbia Pacific. As Central Point would need far more money than Columbia Pacific could legally lend to any one customer, Wolf caused Central Point to spin off two new companies, Kingsland Manor Partnership and Rogue Valley Corporation. Central Point, Kingsland and Rogue Valley each borrowed hundreds of thousands of dollars from Columbia Pacific without revealing Wolf's relationship to these entities.

Another event leading to Wolf's prosecution occurred when First Northwest

sought to borrow money from Canadian Imperial Bank of Commerce. Canadian Imperial refused to lend money to First Northwest until the borrower obtained a "take out" commitment from another bank to provide permanent financing after six months. At Wolf's urging, Pendergraft provided a letter committing Columbia Pacific to the "take out" loan without informing the bank's board of directors.

Columbia Pacific failed in 1983. In 1984, the grand jury returned a 41-count indictment against Wolf. Count 1 charged him with conspiring with Pendergraft and others to defraud the United States by concealing from bank examiners his interest in the loans to First Northwest and its shareholders and related companies. Counts 2-15 charged him with misapplying bank funds in connection with Columbia Pacific's loans to Brookens, Hardy and Griffith.

Counts 16-29 charged him with making or causing to be made false entries in connection with the same loans. Count 30 charged him with causing the issuance of an obligation of the bank without authority from directors. Counts 31-33 charged him with misapplication of bank funds in connection with the loans to Kingsland Manor, Rogue Valley and Central Point. Counts 35-36 charged him with making a false entry with regard to the same loans. (Count 36, which involved the Central Point loan, was later dropped from the indictment). The remaining counts, 37-41, charged Wolf with false entries in connection with the annual director's audit confirmations and other documents which failed to disclose his interests in loans from Columbia Pacific to entities under his control.

Before Wolf's trial, defense counsel moved to strike from the indictment all reference to civil banking statutes. The court denied the motion.

At trial, Richard Warriner, a bank examiner for the Federal Deposit Insurance Corporation, testified over Wolf's objection regarding Federal Reserve Board Regulation O (12 C.F.R. §215), and Oregon Revised Statute §708.305, pertaining to bank lending limits. At the close of the evidence, Wolf proposed jury instructions defining terms in Regulation O and explaining that Or. Rev. Stat. §708.305 permitted the bank to lend money to related corporations even if the aggregate sum exceeded the maximum the bank could lend to any one borrower. The court refused to give Wolf's proposed instructions, and instead instructed the jury that the testimony about civil banking laws was

background information only. The jury convicted Wolf on all counts.

Wolf argues that the district court erred in denying his motion for acquittal. Fed. R. Crim. P. 29(a) requires the district court to grant a motion for acquittal if the evidence is insufficient to sustain a conviction. On appeal from the denial of such a motion, we review de novo the sufficiency of the evidence and affirm if, viewing the evidence in the light most favorable to the government, any rational juror could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Buras, 633 F.2d 1356, 1359 (9th Cir. 1980).

[1] The elements of the crime of misapplication of bank funds, 18 U.S.C. §656, are: (1) defendant is an executive

officer of a bank; (2) the bank is connected with the Federal Reserve; (3) defendant willfully misapplied the bank's funds; and (4) defendant acted with intent to injure and defraud the bank. United States v. Christo, 614 F.2d 486, 490 (5th Cir. 1980); United States v. Krepps, 605 F.2d 101 (3d Cir. 1979). Wolf concedes the first two elements, but argues that the government did not prove willful misapplication or criminal intent.

The misapplication charges in Counts 2-15 derived from the loans Columbia Pacific made to Griffith, Hardy and Brookens for the benefit of First Northwest. Counts 31-33 derived from the loans Columbia Pacific made to Kingsland Manor and Rogue Valley for the benefit of Central Point Development Company. With regard to each series of loans, the jury found that Wolf failed to disclose either

the ultimate recipient of the borrowed funds or that he had an interest in the loans. This nondisclosure, the government argues, caused the bank to make loans it otherwise would not have made.

[2] Wolf admits that Griffith, Hardy and Brookens borrowed from Columbia Pacific in order to transfer funds to First Northwest and that Kingsland Manor and Rogue Valley borrowed in order to transfer funds to Central Point Development. Wolf asserts that these transactions do not constitute misapplication because the "nominal" borrowers were willing and able to repay the loans. Ability to repay is not a defense in this circuit. United States v. Kennedy, 564 F.2d 1329 (9th Cir.), cert. denied, 435 U.S. 944 (1978); Hargreaves v. United States, 75 F.2d 68 (9th Cir.), cert. denied, 295 U.S. 759 (1935). In Kennedy, we found

misapplication even though the nominal borrower was willing and able to repay the loan. 564 F.2d at 1338-39. We stated that a misapplication occurs whenever bank funds are lent under a record that misrepresents a material fact, such as the name of the true borrower or the purpose of the loan. 564 F.2d at 1338-39.

[3] Kennedy applies here. Like the Kennedy borrowers, Griffith, Hardy, Brookens and the two companies each failed to disclose their intention to hand the loan proceeds over to another entity. The evidence makes clear that Wolf arranged all these loans and supervised the loan applications, with the result that the loans were made under a record that misrepresented the true borrower and the purpose of the loans. Wolf's actions amounted to misapplication.

[4] The intent element of 18 U.S.C. §656 is satisfied if the accused intends to deceive bank officials, bank examiners or the Federal Deposit Insurance Corporation. There need be no intent to injure. See Kennedy, 564 F.2d at 1339. Overwhelming evidence at trial established that Wolf arranged the nominee loans in order to deceive bank officials and examiners as to the identity of the true borrower and to conceal his own interest in the loan. A prime example of this knowing deception is the transaction in which he "sold" most of his First Northwest shares to Griffith. Griffith testified that Wolf asked him to buy the shares so that Wolf would no longer have to report his interest in any transaction benefiting First Northwest. He also testified that he paid for the shares with a promissory note for a fraction of the shares' value, and understood that Wolf

would never actually require payment. The records shows that Wolf continued to exercise the same control over First Northwest after the transaction as before. In short, the entire transaction was a smokescreen designed to hide Wolf's continuing interest in loans made to First Northwest.

With regard to the lending limits, Wolf testified that he arranged the loans to Griffith, Brookens, Hardy and the development companies only because First Northwest and Central Point could not borrow enough money directly. Although he argues now that he saw nothing illegal in arranging nominee loans, he never disclosed to the board of directors the true beneficiaries of the loans. The evidence was sufficient for a jury to find that Wolf intended to deceive bank officials in arranging the loans.

[5] The false entry counts arise from the same loans that gave rise to the misapplication charges. The elements of false entry, 18 U.S.C. §§1005 and 2, are: (1) defendant made a false entry in bank records, caused it to be made, or aided and abetted its entry; (2) defendant knew the entry was false when it was made; and (3) defendant intended that the entry injure or deceive a bank or public official. United States v. Jackson, 621 F.2d 216, 219 (5th Cir. 1980). See Hargreaves, 75 F.2d at 72.

[6] The jury found that the bank's records of the loans were false in that they did not reflect either the true borrower or the actual purpose of the loans. The record abounds with evidence that the loans entered on the books as going to Brookens, Hardy, Griffith and the development companies were actually destined for First Northwest and Central Point Development.

[7] The record also supports the jury's determination that Wolf knew the entries were false and caused them to be made. The nominee loans were not only his brainchild, but he helped arrange them. The jury did not need to find that Wolf himself made the entry in the bank's books; it suffices that he set into motion management actions that necessarily caused clerks to make false entries. Krepps, 605 F.2d at 109 n.28. Finally, Wolf had the necessary intent because he intended to deceive bank officials. See Hargreaves, 75 F.2d at 72.

[8] Because we have found that the evidence on misapplication of bank funds and false entry charges was sufficient to support the jury's verdict, Wolf's argument that the conspiracy count must fail is without merit.

Wolf argues that evidence and arguments concerning his possible violations of civil banking regulations impermissibly tainted the trial on the counts relating to the nominee loans. We agree.

[9] The leading cases on the use of evidence regarding civil violations in a criminal misapplication case are United States v. Christo, 614 F.2d 486 (5th Cir. 1980), and United States v. Stefan, 784 F.2d 1093, 1098 (11th Cir.), cert denied 107 S.Ct. 193 (1986). The defendant in Christo was both chairman of the board and majority stockholder of a Florida bank. He was indicted for misapplication and false entry based on alleged overdrafting of his checking account in violation of 12 U.S.C. §375, which prohibits banks from extending credit of more than $5,000 to its own executive officers. At trial, the

government repeatedly referred to Christo's violations of the civil statute and the court instructed the jury it could find that the §375 violations, constituted a criminal misapplication of bank funds. Christo was convicted, but the Fifth Circuit held that the government's references to violations of § 375 "impermissibly infected the very purpose for which the trial was being conducted -- to determine whether Christo willfully misapplied bank funds with an intent to injure and defraud the bank." 614 F.2d at 492. It further found that the jury instructions compounded the error by focusing attention on §375, id., and reversed the conviction.

In United States v. Stefan, the Eleventh Circuit distinguished Christo in affirming a conviction for misapplication and false entry where the government

introduced evidence of civil lending limits. The court read Christo to forbid introducing evidence of civil banking statute violations solely to prove criminal misapplication; it held that Christo did not apply when the evidence was introduced for other, legitimate, purposes. 784 F.2d at 1098. The court affirmed the conviction because it found the government had referred to civil bank lending limits only to show Stefan's motive in arranging sham loans to straw borrowers, and agreed with the government that the jury could not understand the case without knowing about the lending limits. The court also approved a jury instruction to the effect that a civil violation should not be considered as a violation of the criminal law, but that evidence of the civil violations could be considered as evidence bearing on the defendants' intent. Id. at

1099. The court concluded that the tenor of the trial was completely different from that in Christo, and affirmed Stefan's conviction.

With regard to the evidence of bank lending limits, we have no trouble in finding this case more akin to Stefan than to Christo. It was clear throughout the trial that Wolf was not being tried for violating the lending limits. The focus was on whether certain loans were made under a false record. The government charged and proved that Wolf concealed the identity of the true borrower of the bank's funds, and in doing so committed both misapplication and false entry. As in Stefan, violation of lending limits was not directly or indirectly an element of any of the charges. Lending limits provided background information bearing on motive and intent. The court properly made this

clear in its jury instructions by describing the civil violations as background only.

[10] We are far more troubled by the references to violations of Regulation O, which requires approval of a majority of the board of directors to approve loans made to bank officers or executives or to businesses that they control. Unlike references to lending limit violations, the references to Regulation O cannot be dismissed as being simply background information. The references were a key part of the government's case on the misapplication and false entry counts. With regard to each of these counts, the indictment charged that Wolf committed a criminal act in part because the loan applications failed to disclose Wolf's connection with First Northwest, the ultimate beneficiary of the loans.

However, neither §656 or §1005 requires a loan applicant to reveal any particular information. The government points out that one can commit misapplication and false entry by failing to disclose a material fact on a bank document. Krepps, 605 F.2d at 109. This response begs the question whether Wolf's connection with First Northwest was a material fact for purposes of the loan applications. The loan applications themselves did not ask for such information; neither does any criminal statute. Cf. United States v. Murphy, 809 F.2d 1427 (9th Cir. 1987)(defendant could not be convicted of conspiracy to defraud the United States simply because during certain bank transactions he concealed information that no statute required him to disclose); United States v. Varbel, 780 F.2d 758 (9th Cir. 1986)(same). To supply the missing element of the false entry and

misapplication charges, the government turned to Regulation O. Through its expert witness the government established that Regulation O imposed a duty on Wolf to inform the bank's directors that he had an interest in the loans for which Griffith, Brookens, Hardy and the development companies were applying. In sum, the government used Regulation O to supply a crucial element of the misapplication and false entry charges. 1/ The jury instructions, which described Regulation O as background evidence, could not repair the damage caused by the indictment,

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1/ We note that the government did not need to rely upon Regulation O. The evidence that each loan application misidentified the true borrower would have been enough to sustain the convictions for misapplication and false entry. However, the indictment and the government's evidence and argument made Regulation O a key element of the charges by suggesting that it was criminal to submit loan applications that did not satisfy Regulation O's disclosure requirement.

testimony and argument. With regard to the alleged nominee loans, the situation created a serious risk that the jury would find Wolf guilty of criminal misapplication and false entry because he failed to comply with Regulation O.

The taint from the improper use of Regulation O does not extend to the conspiracy count or the counts concerning the director's audits and the commitment letter on the Canadian Imperial loan. Regulation O had nothing to do with the audits or letter, and there is no reason to believe the jury considered it in deliberating these counts. 2/ Therefore,

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2/ Although the government alleged that Wolf violated the false entry statute by failing to disclose his interest in First Northwest, it did not have to use Regulation O to define the duty to disclose. The confirmation forms themselves described in detail under what circumstances disclosure was required. For that reason, the jury would have no reason

we reverse and remand for retrial on Counts 2-29 and 31-35 only. We affirm the convictions on Counts 1, 30 and 37-41.

Affirmed in part, reversed in part, and remanded.

2/ (cont'd)to resort to Regulation O in its deliberations. The charge relating to the confirmation letter did not involve a failure to disclose.

APPENDIX B
B-1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	No. 86-3041
Plaintiff-Appellee,	)	
	)	
v.	)	O R D E R
	)	
THOMAS E. WOLF,	)	
	)	
Defendant-Appellant.	)	

Before: KOELSCH, GOODWIN and THOMPSON, Circuit Judges

Appellant's petition for rehearing is denied.

APPENDIX C
C-1

Oregon revised Statute (ORS) 708.305, as written at the time here pertinent, is as follows:

> "(1) Except as provided in ORS 708.310 to 708.370 [which are not pertinent here], the total obligations of a person to a bank shall not exceed 15 percent of the aggregate paid-up and unimpaired capital and surplus. Any loan made under any of such exceptions shall be in addition to the 15 percent loan limitation.
>
> "(2) The limitations of this section shall not apply to time or demand deposits in approved reserve depository banks or other banks.
>
> "(3) Obligations, negotiated in another name for the benefit of any person shall be included in the obligations of the person benefited."

Regulation O, 12 CFR § 215, provides in pertinent part:

§ 215.1 Authority, purpose, and scope.

> "(a) Authority. This subpart is issued pursuant to sections 11(i), 22(g) and 22(h) of the Federal Reserve Act (12 U.S.C. 248(i), 375a, 375b(7) and 12 U.S.C. 1817(k) (3).

"(b) Purpose and scope. This subpart governs any extension of credit by a member bank to an executive officer, director, or principal shareholder of (1) the member bank
* * *. It also applies to any extension of credit by a member bank to (1) a company controlled by such a person * * *.

§ 215.2 Definitions.

"For the purposes of this subpart, the following definitions apply unless otherwise specified:

"(a) 'Company' means any corporation, partnership * * * or any other form of business entity not specifically listed herein. * * *

"(b) (1) 'Control of a company or bank' means that person directly or indirectly, or acting through or in concert with one or more persons:

"(i) Owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the company or bank;

"(ii) Controls in any manner the election of a majority of the directors of the company or bank; or

"(iii) Has the power to exercise a controlling influence over the management or policies of the company or bank."

"(2) A person is presumed to have control, including the power to exercise a controlling influence over the management or policies of a company or bank if:

"(i) The person is (A) an executive officer or director of the company or bank and (B) directly or indirectly owns, controls, or has the power to vote more than 10 percent of any class of voting securities of the company or bank; or

"(ii) (A) The person directly or indirectly owns, controls, or has the power to vote more than 10 percent of any class of voting securities of the company or bank, and (B) no other person owns, controls, or has the power to vote a greater percentage of that class of voting securities.

"(3) An individual is not considered to have control, including the power to exercise a controlling influence over the management or policies, of a company or bank solely by virtue of the individual's position as an officer or director of the company or bank.

* * * * *

"(c) 'Director of a member bank' includes (1) any director of a member bank, whether or not receiving compensation * * *.

* * * * *

"(g) 'Member bank' means any banking institution that is a member of the Federal Reserve System. * * *

* * * * *

"(i) 'Person' means an individual or a company.

"(j) 'Principal shareholder' means an individual or a company (other than an insured bank) that directly or indirectly, or acting through or in concert with one or more persons, owns, controls, or has the power to vote more than 10 percent of any class of voting securities of a member bank or company. * * *

"(k) 'Related interest' means (1) a company that is controlled by a person ***.

§ 215.4 General prohibitions.

"(a) Terms and creditworthiness. * * *

* * * * *

"(b) Prior approval. (1) No member bank may extend credit (which term includes granting a line of credit) to any of its executive officers, directors, or principal

shareholders or to any related interest of that person in an amount that, when aggregated with the amount of all other extensions of credit to that person and to all related interests of that person, exceeds the higher of $25,000 or 5 percent of the member bank's capital and unimpaired surplus, unless:

"(i) The extension of credit has been approved in advance by a majority of the entire board of directors of that bank, and (ii) the interested party has abstained from participating directly or indirectly in the voting. In no event may a member bank extend credit to any one of its executive officers, directors, or principal shareholders, or to any related interest of that person, in an amount that, when aggregated with all other extensions of credit to that person, and all related interests of that person, exceeds $500,000, except by complying with the requirements of this paragraph."

18 U.S.C. §371 provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. §1005 provides:

"Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or

"Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

"Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System--

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit on the counsel for Respondent by enclosing three copies thereof in an envelope, postage prepaid, addressed to:

Mr. Charles Fried
Department of Justice
Office of the Solicitor General
10th and Constitution Ave., N.W.
Room 5143
Washington, D.C. 20530

and depositing the same in the United States mail at Portland, Oregon, on December 7, 1987, and further certify that all parties required to be served have been served.

Norman Sepenuk
Of Attorneys for Petitioner